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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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COMMISSIONERS

MARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON

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In the matter of:

JOHN R. WALLRICH and JANE DOE
WALLRICH, husband and wife
10742 SW Heron Place
Beaverton, OR 97007,

Respondents.

DOCKET NO. S-03506A-02-0000

SECURITIES DIVISION'S REPLY IN
SUPPORT OF ITS MEMORANDUM OF
LAW REGARDING THE EFFECT OF
A.R.S. § 44-2031(C) IN THIS ACTION

The Securities Division ("Division") of the Arizona Corporation Commission (the "Commission") submits the following Reply in Support of Its Memorandum of Law Regarding the Effect of A.R.S. § 44-2031(C) in This Action. Respondents have again misinterpreted the scope and effect of that section, and have ignored the fact that the liability of the Wallrich community had been established by Arizona law that existed even before the actions complained of herein. Jennifer Wallrich properly has been brought before the Commission in this action, and the Commission appropriately may determine the liability of the community of Respondents John R. Wallrich ("Wallrich") and Jennifer Wallrich for violations of the Arizona Securities Act, A.R.S. §§ 44-1801 through 44-2126 (the "Securities Act").

RESPECTFULLY SUBMITTED this 5th day of March, 2003.

ARIZONA CORPORATION COMMISSION,
SECURITIES DIVISION

By

Kathleen Coughenour DeLaRosa
Kathleen Coughenour DeLaRosa
1300 West Washington, Third Floor
Phoenix, Arizona 85007
Attorney for the Securities Division

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. THE ARIZONA STATUTE BARRING RETROACTIVE APPLICATION OF**
3 **STATUTORY AMENDMENTS DOES NOT APPLY TO PROCEDURAL**
4 **MEASURES.**

5 Respondents initially contend that A.R.S. § 1-244 applies to prohibit retroactive application
6 of the recent amendment to A.R.S. § 2031. Response to Securities Division's Memorandum of
7 Law Regarding Effect of A.R.S. § 44-2031(C) ("Response"), at 2-3. Section 1-244 provides that
8 "[n]o statute is retroactive unless expressly declared therein."

9 A.R.S. § 44-2031(C) is not being applied retroactively in this action, but even if it is so
10 applied, Arizona courts long ago acknowledged an exception to the absolute rule expressed in
11 A.R.S. § 1-244: Legislation that is merely procedural in nature, and does not affect substantive
12 rights, may be applied retroactively, whether or not the statute contains an expression of
13 retroactive intent. *See, e.g., In re Appeal in Maricopa Cty. Juv. Actions Nos. JV-512600 & JV-*
14 *512797*, 187 Ariz. 419, 422, 930 P.2d 496, 499 (1996).

15 Although Respondents' argument initially ignores the fact that the courts have crafted that
16 judicial exception to the statute, Response sec. B.1., they later acknowledge that legislation may
17 apply retroactively if it does not affect an earlier established substantive right. Response sec. B.3.
18 As a result, their argument that A.R.S. § 1-244 bars retroactive application of the amendment to
19 section 44-2031 cannot prevail.

20 **II. THE 2002 AMENDMENT TO SECTION 44-2031 IS PROCEDURAL, AND MAY**
21 **APPLY RETROACTIVELY.**

22 **A. A.R.S. § 44-2031(C) Is Procedural, Not Substantive.**

23 In one recent discussion of the distinction between substantive and procedural measures,
24 the Arizona Court of Appeals explained:

25 The distinction between substantive law and procedural law has been
26 described as follows:

 [S]ubstantive law is that part of the law which creates, defines
 and regulates rights; ... procedural law is that which

1 prescribes the method of enforcing the right or obtaining
2 redress for its invasion. It is often said [procedural] law
3 pertains to and prescribes the practice, method, procedure or
4 legal machinery by which the substantive right is enforced or
5 made effective.

6
7 *Graf v. Whitaker*, 192 Ariz. 403, 406 ¶ 10, 966 P.2d 1007, 1010 (App. 1998), *rev. denied*, quoting
8 *State v. Birmingham*, 96 Ariz. 109, 110, 392 P.2d 775, 776 (1964).

9 In this case, the substantive law that applied at the time of Wallrich's 1999 actions includes
10 various provisions of the Arizona Securities Act (including A.R.S. § 44-1991, prohibiting securities
11 fraud, § 44-1841, barring the sale of unregistered securities, and § 44-1842, forbidding securities
12 sales by persons who are not registered to sell securities) and A.R.S. § 25-215, prescribing the
13 liability of community property for debts or obligations incurred during a marriage. The 2002
14 amendment to A.R.S. § 2031 had absolutely no effect on these obligations.

15 At the time of his acts, Wallrich knew or should have known that his conduct was illegal
16 under the Securities Act. He likewise knew or should have known that the community was liable
17 for debts or obligations he incurred. *See, e.g., Keplinger v. Boyett*, 6 Ariz. App. 514, 517, 433 P.2d
18 1006, 1009 (1967). Moreover, he knew or should have known that Arizona law required joinder of
19 a spouse in an action seeking to collect a community obligation from the community's property.
20 He therefore had no right to rely on a possible lack of personal jurisdiction to shield the community
21 from liability for his actions. As a result, he cannot reasonably argue that A.R.S. § 44-2031(C)
22 affects some right of his or his spouse that was vested prior to the 2002 amendments to the
23 Securities Act.

24 A.R.S. § 44-2031(C) does not in any way apply to any vested right of Wallrich or of
25 Jennifer Wallrich, and does not impose any liability on the community. It simply establishes a
26 procedure that makes it possible for the Division to comply with the pre-existing statutory
requirement that the spouse be joined in an action seeking to collect a debt from community
property. Indeed, instead of imposing liability, it gives the spouse the opportunity to appear and
defend her interests in the community.

1 **B. A.R.S. § 44-2031(C) Does Not Affect a Vested Substantive Right.**

2 The rights of spouses in their community property were defined in statutes that were in
3 effect in Arizona prior to Wallrich's 1999 actions alleged in this proceeding. *E.g.*, A.R.S.
4 §§ 25-214, 25-215. Under those statutes, either spouse may bind the community (except with
5 respect to specific transactions not at issue in this case), although the spouse who has not
6 contracted a debt may present proof that the debt was not community in nature. *See, e.g.*,
7 *Keplinger v. Boyett*, 6 Ariz. App. 514, 517, 433 P.2d 1006, 1009 (1967). Thus, the obligation in
8 question here was created under Arizona law in existence at the time Wallrich did the acts the
9 Division complains of in this action. Joinder of Jennifer Wallrich in this action merely enables the
10 Commission to collect from the community property in connection with a potential order, without
11 being required to file a collection action in another forum before doing so.

12 Although "[a] statutorily created substantive right cannot be enlarged or diminished by
13 judicial rule," "the manner in which the right may be exercised is subject to control through the
14 use of procedural rules." *Graf v. Whitaker*, 192 Ariz. at 405 ¶ 9, 966 P.2d at 1009 (citations
15 omitted).

16 The provision in A.R.S. § 25-215 that requires joinder of a spouse in an action to collect a
17 debt from community property repeatedly has been interpreted as a procedural measure, not as a
18 substantive law that creates due process rights in a spouse. *See, e.g.*, *Alberta Secs. Comm'n v.*
19 *Ryckman*, 200 Ariz. 540, 549-550 ¶¶ 37, 39, 30 P.3d 121, 130-131 (App. 2001); *National Union*
20 *Fire Ins. Co. of Pittsburgh, Pa v. Greene*, 195 Ariz. 105, 108 ¶ 11, 110 ¶ 19, 985 P.2d 590, 593,
21 595 (App. 1999).

22 Moreover, prior to the amendment of A.R.S. § 44-2031, the Commission already had every
23 right, after entry of an administrative order, to transfer the judgment to Superior Court and file a
24 collection action against both spouses. *See National Union*, 195 Ariz. at 107 ¶ 5, 985 P.2d at 592.
25 The only effect of the amendment to A.R.S. § 44-2031 thus is to save time and dollar resources by
26 hearing the spouse's defense in the primary action rather than in a subsequent collection action.

1 As a result, even if the statute is being applied retroactively, Arizona law permits such
2 application. A.R.S. § 44-2031(C) does not create or alter substantive vested rights. It simply
3 provides a method of procedure by which the Commission can enforce those rights.

4 **C. No Impermissible Retroactive Application Exists Here.**

5 “It must be remembered that a statute is not retrospective from the mere fact that it relates
6 to antecedent facts.” *American Fed’n of Labor v. American Sash & Door Co.*, 67 Ariz. 20, 39, 189
7 P.2d 912, 925 (1948), *prob. jurisdiction noted*, 68 S. Ct. 744, *aff’d*, 335 U.S. 538 (1949). “[L]aws
8 that operate on pre-existing conditions, . . . are not retrospective by their mere relation to
9 antecedent conditions.” *Cohen v. State*, 121 Ariz. 6, 9, 588 P.2d 299, 302 (1978) (citations
10 omitted).

11 In 1990, the Arizona Court of Appeals faced a challenge to application in an already
12 pending proceeding of a portion of the recently adopted Victim’s Bill of Rights. *State v. Warner*,
13 168 Ariz. 261, 812 P.2d 1079 (App. 1990). Defendants in several criminal actions contended that
14 permitting their alleged victims to refuse interviews constituted impermissible retroactive
15 application of that amendment to the Arizona Constitution. *Id.* at 263, 812 P.2d at 1081.

16 The court found that permitting the victims to assert the right did not constitute retroactive
17 application of the statute. “No issue of retroactivity is presented here as to the victims. The
18 victims do not seek to invoke the amendment to support a refusal to be interviewed asserted prior
19 to the effective date of the amendment; they assert the right presently, to preclude any interview
20 after the effective date.” *Id.* at 264, 812 P.2d at 1082. The court further opined that, in any case,
21 the provision in question was a matter of procedure, rather than substance:

22 Although the general rule is that legislation will have prospective
23 application only, the rule is otherwise where the legislation is merely
24 procedural in nature and does not affect substantive rights.

25 Uniformly, the substantive law is that part of the law which
26 creates, defines and regulates rights; whereas the adjective,
remedial or procedural law is that which prescribes the
method of enforcing the right or obtaining redress for its
invasion.

1 Our courts have consistently held that a criminal defendant has no
2 vested or substantive right to a particular mode of procedure. ...

3 In this case, the substantive right involved is the right to confront and
4 cross-examine the witnesses against the real parties in interest, that
5 is, the victims. The amendment does not affect that right, which can
6 be fully exercised at trial; rather, if invoked, it deprives the real
parties in interest of a method of discovery. In our view, the right to
interview or depose a victim under Rule 15 is clearly procedural in
nature, and the application of the amendment does not impair any
substantive or vested rights of the real parties in interest.

7 *Id.* at 264, 812 P.2d at 1082 (citations omitted).

8 Similarly, in this case, joinder of Jennifer Wallrich in this action does not impair any
9 substantive or vested rights of Wallrich or Jennifer Wallrich. It provides the Commission with a
10 procedural vehicle by which the Commission may comply with the procedural requirement that a
11 spouse must be joined in an action to collect a community debt from community property, and
12 gives Jennifer Wallrich the opportunity to appear and defend against such liability. As a result,
13 there is no impermissible retroactive application of A.R.S. § 44-2031(C) in this case.

14 **III. THE PROHIBITION AGAINST EX POST FACTO LAWS DOES NOT AFFECT**
15 **THE APPLICATION OF A.R.S. § 44-2031(C) IN THIS PROCEEDING.**

16 Respondents also argue that retroactive application of A.R.S. § 44-2031(C) would violate
17 the constitutional prohibition against ex post facto laws. Response sec. B.5. That argument
18 ignores the established principle of law that the prohibition against ex post facto laws applies
19 exclusively to criminal proceedings. *Cohen v. State*, 121 Ariz. at 9, 588 P.2d at 302.

20 This is not a criminal proceeding. The Division is specifically authorized to bring civil and
21 administrative proceedings to enforce the Securities Act. *See* A.R.S. §§ 44-1971 – 44-1974, 44-
22 2032. Although the Division is also authorized to refer matters for criminal prosecution, A.R.S.
23 § 44-2032(5), it has not done so in this case. As a result, the constitutional prohibition against ex
24 post facto laws does not affect the determination of this issue.

25 ...

26 ...

1 **IV. THE DIVISION REQUESTS PERMISSION TO AMEND ITS NOTICE OF**
2 **OPPORTUNITY FOR HEARING IN THIS MATTER TO CONFORM TO THE**
3 **LIMITS OF COMMISSION JURISDICTION.**

4 Respondents have made a valid point in section B.6. of their Response. Although the
5 Division did not intend to pursue any relief against Jennifer Wallrich other than that authorized by
6 A.R.S. § 44-2031(C), the Division acknowledges that the Notice of Opportunity for Hearing
7 Regarding Proposed Order to Cease and Desist, for Restitution, for Administrative Penalties, and
8 for Other Affirmative Action ("Notice") was not drafted with sufficient precision to make clear
9 that the Division was not requesting additional relief not authorized by that section. As a result,
10 the Division submits herewith as Exhibit "A" a proposed amendment to the Notice, drafted to
11 clarify that the sole relief sought by joinder of Jennifer Wallrich is a determination of the liability
12 of the marital community for payment of restitution and administrative penalties herein. The
13 Division requests that the Hearing Officer grant permission to the Division for filing of this
14 amendment to clarify that the relief sought by the Division conforms to that authorized by the
15 statute.

16 **CONCLUSION**

17 Respondents' objections to the Division's assertion of jurisdiction over Jennifer Wallrich to
18 determine the liability of the marital community of John R. Wallrich and Jennifer Wallrich are not
19 supportable under Arizona law. The 2002 amendment to A.R.S. § 44-2031 does not create or alter
20 any substantive rights. It does not alter the liability of the marital community in any way. It
21 simply provides the Division and the Commission with a procedural vehicle to join Mrs. Wallrich
22 in the administrative action, rather than waiting to file a later collection action in which she may
23 also be joined.

24 With respect to any additional jurisdiction the Notice appears to request against Jennifer
25 Wallrich individually, Respondents are correct. The Division does not seek to impose any
26 individual liability on Mrs. Wallrich. As a result, the Division requests permission to amend the
Notice to make clear that its only reason for joining Jennifer Wallrich is to determine the liability

1 of the marital community of John Wallrich and Jennifer Wallrich for the acts of John Wallrich.

2 RESPECTFULLY SUBMITTED this 5th day of March, 2003.

3 ARIZONA CORPORATION COMMISSION,
4 SECURITIES DIVISION

5
6 By  Kathleen Coughenour DeLaRosa

7 Kathleen Coughenour DeLaRosa
8 1300 West Washington, Third Floor
9 Phoenix, Arizona 85007
10 Attorney for the Securities Division

11 COPY of the foregoing
12 mailed this 5th day
13 of March, 2003, to:

14 Wayne A. Smith, Esq.
15 Robbins & Green, P.A.
16 3300 North Central, Suite 1800
17 Phoenix, Arizona 85012-2518
18 Attorneys for Respondents

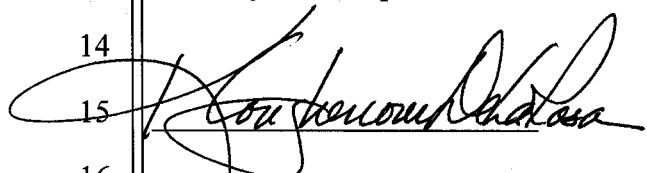
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Reply in Support of Memorandum of Law Re 44-2031.doc

EXHIBIT "A"

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2
3 WILLIAM A. MUNDELL
4 Chairman
5 JIM IRVIN
6 Commissioner
7 MARC SPITZER
8 Commissioner

9 In the matter of:

10 JOHN R. WALLRICH and JENNIFER
11 WALLRICH, husband and wife,
12 10742 SW Heron Place
13 Beaverton, OR 97007,

14 Respondents.

) DOCKET NO. S-03506A-02-0000
)

) **A M E N D E D**

) **NOTICE OF OPPORTUNITY FOR HEARING**
) **REGARDING PROPOSED ORDER TO**
) **CEASE AND DESIST, FOR RESTITUTION,**
) **FOR ADMINISTRATIVE PENALTIES, AND**
) **FOR OTHER AFFIRMATIVE ACTION**

15 **NOTICE: RESPONDENTS HAVE 10 DAYS TO REQUEST A HEARING (See VIII)**

16 **NOTICE: RESPONDENTS HAVE 30 DAYS TO FILE AN ANSWER (See IX)**

17 The Securities Division ("Division") of the Arizona Corporation Commission ("Commission")
18 alleges that respondent has engaged in acts, practices and transactions that constitute violations of the
19 Securities Act of Arizona, A.R.S. § 44-1801 *et seq.* ("Securities Act").

20 **I.**

21 **JURISDICTION**

22 1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona
23 Constitution and the Securities Act.

24 **II.**

25 **RESPONDENT**

26 2. Respondent JOHN R. WALLRICH ("WALLRICH") at all times material hereto was a
resident of Arizona. At all times material hereto, WALLRICH was licensed to sell insurance in the
state of Arizona, but was not registered as a securities salesperson or an investment advisor
representative in Arizona.

3. At all times material hereto, JENNIFER WALLRICH was married to WALLRICH. All acts done by WALLRICH were done in furtherance of and for the benefit of the marital community of WALLRICH and JENNIFER WALLRICH. JENNIFER WALLRICH therefore is joined in this action, pursuant to A.R.S. § 44-2031(C), to determine the liability of the marital community for the violations alleged herein.

4. WALLRICH may be referred to herein as "RESPONDENT." JENNIFER WALLRICH may be referred to herein as "RESPONDENT SPOUSE."

III.

FACTS

5. At all times material hereto, Alpha Telcom, Inc. ("Alpha") was an Oregon corporation located at 2751 Highland Avenue, Grants Pass, Oregon 97526.

6. At all times material hereto, American Telecommunications Company, Inc. (“ATC”) was a Nevada corporation formed as a wholly owned subsidiary of Alpha on or about September 17, 1998. Originally named ATC, Inc., the name was changed to American Telecommunications Company, Inc., sometime in the first half of 2000. Its address was the same as Alpha’s, but was later changed to 620 S.W. 4th Street, Grants Pass, Oregon 97526, then to 2900 Vine Street, Suite J, Grants Pass, Oregon 97526, and then to 942 S.W. 6th Street, Suite G, Grants Pass, Oregon 97526.

7. At all times material hereto, Paul S. Rubera ("Rubera") was the president and control person of Alpha, and the control person of ATC.

8. ATC was organized by Rubera and operated in conjunction with and as an alter ego of Alpha. The two companies were controlled by Rubera and his associates.

9. At all times material hereto, Alpha and ATC, and their affiliates, sold pay telephones with telephone service agreements pursuant to which the investor would share in the profits of the pay telephone. Investors would enter into two agreements, a purchase agreement, and a service agreement with Alpha to manage the phone. The two agreements were presented and promoted simultaneously. The telephones were presented to potential investors with four options in the way

1 of service contracts, each varying in the amount of service provided. The four options varied from
2 Level 1, which included a minimum of service, to Level 4, which provided full service to the
3 purchaser, including choosing a site and installing the telephone, collecting all revenue from the
4 telephone's operation, repairing the telephone when necessary, and even repurchasing or buying
5 back the telephone at the investor's option. Under Level 4, Alpha would split the net proceeds
6 with the investor on a 70/30 basis, with Alpha retaining 70% and the investor receiving 30%. The
7 price of the pay telephones was the same regardless of the service option chosen, \$5,000.00 per
8 telephone. Although investors were given a choice of using a company other than Alpha to
9 manage the phone, no known Arizona investor picked a company other than Alpha to manage their
10 phones. A "typical return" on each pay telephone was touted as 14% per year. In practice, all
11 purchasers received \$58.34 per month per pay telephone purchased, which amounted to exactly
12 14% per annum.

13 10. ATC's primary role was marketing the contracts. Alpha's main focus was on obtaining
14 phone sites and installing, servicing, and managing the phones.

15 11. ATC was presented to the public as the sales organization for Alpha. In early 1999,
16 ATC engaged Strategic Partnership Alliance, L.L.C., a Nevada limited liability company, and/or
17 SPA Marketing, L.L.C., a Nevada limited liability corporation, (collectively "SPA") as its
18 independent marketing and sales firm(s). SPA thereafter was responsible for hiring, training, and
19 supervising sales agents who were selling the telephone contracts. After SPA came on board, ATC
20 remained as the processing center for the contracts, while Alpha continued to perform the service
21 and maintenance of the phones.

22 12. WALLRICH, directly or indirectly, entered into agreements with Alpha, ATC, and/or
23 SPA, pursuant to which WALLRICH sold investment contracts involving Alpha pay telephones
24 (the "Alpha investment contracts") within or from the state of Arizona. All Alpha investment
25 contracts WALLRICH sold were Level 4 contracts.

26 13. WALLRICH told prospective investors their investments were insured. The insurer

1 named varied. Mentioned most often was the Northern and Western Insurance Company of Grand
2 Turk, Turks and Caicos Islands, British West Indies ("N&W"). Also mentioned were Lloyd's of
3 London and four other insurance companies listed as re-insurers. N&W was a captive insurance
4 company wholly owned by Paul S. Rubera, the President and control person of Alpha, and Robert
5 S. Harrison of Richmond, Texas. N&W is not authorized to write insurance in Arizona. On
6 information and belief, N&W was not authorized to write insurance in any state in which the Alpha
7 pay telephones were located. In a letter dated August 15, 2001, Harrison stated: "There is not
8 now, nor was there ever any insurance coverage for Alpha Telecom, Inc."

9 14. WALLRICH presented Alpha to prospective customers as a stable, profitable, and
10 innovative company that had been in business since 1985. Alpha was said to be selling and
11 providing a "turn-key" operation.

12 15. On information and belief, all sales agents, including WALLRICH, were paid
13 commissions ranging from 12% to 19% per telephone sold.

14 16. WALLRICH participated in recruiting other licensed insurance salespersons to sell
15 Alpha investment contracts. During this activity, WALLRICH represented that the Alpha
16 investment contracts were not securities, and that salespersons did not need to be registered to sell
17 securities before selling the Alpha investment contracts. On information and belief, WALLRICH
18 received commissions or other compensation as a result of referral of such salespersons to Alpha
19 and/or ATC and/or SPA.

20 17. WALLRICH sold Alpha investment contracts involving at least 138 telephones to at least
21 28 individuals or entities within or from the state of Arizona from May, 2000 through May, 2001, for
22 a total sales amount of at least \$685,250.00.

23 18. Alpha has a long regulatory history in which state securities regulators have found that
24 these purchases of pay telephones and accompanying service contracts were unregistered securities in
25 the form of investment contracts that were sold by unregistered persons and/or entities, and ordered
26 Alpha and those working with it to cease and desist. Most Arizona investors to whom WALLRICH

1 sold the Alpha investment contracts were not aware of these orders. The orders that WALLRICH
2 could have revealed include:

- 3 a. February 2, 1999, Cease and Desist Order issued by Pennsylvania Securities
4 Commission, *In the Matter of Alpha Telcom, Inc., et al.*, No. 9812-06.
- 5 b. November 17, 1999, Cease and Desist Order issued by North Carolina
6 Secretary of State, *In the Matter of the North Carolina Securities Division v.*
7 *ATC, Inc., Paul Rubera, et al.*, No. 99-038-CC.
- 8 c. June 30, 1999, Temporary Order of Prohibition issued by Illinois Secretary
9 of State, *In the Matter of Alpha Telcom, Inc.*, No. 9900201.
- 10 d. January 14, 2000, Consent Order of Prohibition issued by Illinois Secretary
11 of State, *In the Matter of Alpha Telcom, Inc.*, No. 9900201, in which Alpha
12 agreed to offer rescission to all Illinois purchasers.
- 13 e. November 24, 1999, Cease and Desist Order issued by Wisconsin
14 Department of Financial Institutions, *In the Matter of Alpha Telcom, Inc.*
15 *and Paul S. Rubera, et al.*, No. S-99225(EX).
- 16 f. March 7, 2000, Temporary Cease and Desist Ordered issued by Rhode
17 Island Department of Business Regulation, *In the Matter of Alpha Telcom,*
18 *Inc. and ATC, Inc.*
- 19 g. July 18, 2000, Florida Department of Banking and Finance filed
20 administrative action against Alpha and others, seeking a Cease and Desist
21 Order.
- 22 h. October 24, 2000, Desist and Refrain Order issued by California Department
23 of Corporations.

19. Actions against Alpha after WALLRICH ceased his sales of the Alpha investment
20 contracts include:

- 21 a. July 26, 2001, Cease and Desist Order issued by Ohio Commissioner of
22 Securities;
- 23 b. August 27, 2001, Temporary Restraining Order issued by United States
24 District Court, District of Oregon, *SEC v. Alpha Telcom, Inc., et al.*, No.
25 CV 01-1283 PA
- 26 c. September 5, 2001, Cease and Desist Order issued by Arkansas Securities
Department, *In the Matter of Alpha Telcom, Inc., et al.*, No. 01-36-S.
- d. September 6, 2001, Preliminary Injunction issued by United States District
Court, District of Oregon, *SEC v. Alpha Telcom, Inc., et al.*, No. CV 01-1283
PA.

1 e. February 7, 2002, Final Judgment of Permanent Injunction issued by United
2 States District Court, District of Oregon, *SEC v. Alpha Telecom, Inc., et al.*, No.
3 CV 01-1283 PA.

4 f. March 13, 2002, Final Order to Cease and Desist issued by Washington
5 Department of Financial Institutions, *In the Matter of Alpha Telecom, Inc., et*
6 *al.*, No. SDO-21-02.

7 The SEC's Complaint in the United States District Court, District of Oregon, alleged that Alpha
8 and its affiliates engaged in a Ponzi-like scheme that never generated enough income to pay
9 expenses, and that the money paid to existing investors always came from sales to new investors.
10 Several days before the Temporary Restraining Order was issued on August 27, 2001, Alpha
11 sought bankruptcy protection in Florida pursuant to chapter 11 of the Bankruptcy Code. A court-
12 appointed receiver subsequently took over the remaining operations of Alpha. Alpha consented
13 on October 19, 2001 to entry of the Final Judgment of Permanent Injunction against it, but did
14 not admit the allegations of the Complaint.

15 20. On February 7, 2002, the United States District Court for the District of Oregon
16 issued its final opinion in connection with the trial of Paul Rubera. That opinion is reported at
17 *SEC v. Alpha Telecom*, 187 F. Supp. 2d 1250 (D. Or. 2002). In its opinion, the court confirmed
18 that the Alpha investment contracts are securities and thus subject to regulation as securities. The
19 court also confirmed that Alpha operated what was essentially a Ponzi scheme in connection with
20 the sale of the Alpha investment contracts.

21 21. Monthly payments to investors ceased prior to August, 2001.

22 IV.

23 VIOLATION OF A.R.S. § 44-1841

24 (Offer or Sale of Unregistered Securities)

25 22. From on or about May 1, 1999, WALLRICH offered or sold securities in the form of
26 investment contracts, within or from Arizona.

23 23. The securities referred to above were not registered pursuant to Articles 6 or 7 of the
24 Securities Act.

24. This conduct violates A.R.S. § 44-1841.

V.

VIOLATION OF A.R.S. § 44-1842

(Transactions by Unregistered Dealers or Salesmen)

25. WALLRICH offered or sold securities within or from Arizona while not registered as a dealer or salesman pursuant to Article 9 of the Securities Act.

26. This conduct violates A.R.S. § 44-1842.

VI.

VIOLATION OF A.R.S. § 44-1991

(Fraud in Connection with the Offer or Sale of Securities)

27. In connection with the offer or sale of securities within or from Arizona, WALLRICH directly or indirectly: (i) employed a device, scheme or artifice to defraud; (ii) made untrue statements of material fact or omitted to state material facts which were necessary in order to make the statements made not misleading in light of the circumstances under which they were made; or (iii) engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon offerees and investors. WALLRICH'S conduct includes, but is not limited to, the following:

- a) WALLRICH failed to advise purchasers of the state regulatory actions against Alpha and of the potential consequences of those orders with respect to their investment;
- b) WALLRICH represented to purchasers that their investment and/or the pay telephones they purchased were fully insured, when they were not, in fact, insured by any insurance company authorized to provide insurance in Arizona or in any state in which the pay telephones were located;
- c) WALLRICH represented to purchasers that monies they would receive as a result of their investment were derived from profits on the pay telephones purchased, when in fact the returns paid to investors came from purchases by subsequent investors;

d) WALLRICH represented to sales agents recruited to sell the Alpha investment contracts that the Alpha investment contracts were not securities, and that the sales agents did not need to be registered to sell securities in order to sell the Alpha investment contracts.

28. This conduct violates A.R.S. § 44-1991.

VII.

REQUESTED RELIEF

The Division requests that the Commission grant the following relief against RESPONDENT:

1. Order RESPONDENT to permanently cease and desist from violating the Securities Act, pursuant to A.R.S. § 44-2032;

2. Order RESPONDENT to take affirmative action to correct the conditions resulting from his acts, practices or transactions, including a requirement to make restitution pursuant to A.R.S. § 44-2032;

3. Order RESPONDENT to pay the state of Arizona administrative penalties of up to five thousand dollars (\$5,000) for each violation of the Securities Act, pursuant to A.R.S. § 44-2036; and

4. Order any other relief that the Commission deems appropriate.

VIII.

HEARING OPPORTUNITY

RESPONDENT, including RESPONDENT SPOUSE, may request a hearing pursuant to A.R.S. § 44-1972 and A.A.C. R14-4-306. **If any Respondent requests a hearing, that Respondent must also answer this Notice.** A request for hearing must be in writing and received by the Commission within 10 business days after service of this Notice of Opportunity for Hearing. Each RESPONDENT must deliver or mail the request to Docket Control, Arizona Corporation Commission, 1200 W. Washington, Phoenix, Arizona 85007. A Docket Control cover sheet must

1 accompany the request. A cover sheet form and instructions may be obtained from Docket Control
2 by calling (602) 542-3477 or on the Commission's Internet web site at
3 www.cc.state.az.us/utility/forms/index.htm.

4 If a request for a hearing is timely made, the Commission shall schedule the hearing to begin
5 20 to 60 days from the receipt of the request unless otherwise provided by law, stipulated by the
6 parties, or ordered by the Commission. If a request for a hearing is not timely made, the Commission
7 may, without a hearing, enter an order against each RESPONDENT granting the relief requested by
8 the Division in this Notice of Opportunity for Hearing.

9 Persons with a disability may request a reasonable accommodation such as a sign language
10 interpreter, as well as request this document in an alternative format, by contacting Shelly M.
11 Hood, Executive Assistant to the Executive Secretary, voice phone number 602/542-3931, e-mail
12 shood@cc.state.az.us. Requests should be made as early as possible to allow time to arrange the
13 accommodation.

14 IX.

15 ANSWER REQUIREMENT

16 Pursuant to A.A.C. R14-4-305, if RESPONDENT or RESPONDENT SPOUSE requests a
17 hearing, RESPONDENT or RESPONDENT SPOUSE must deliver or mail an Answer to this
18 Notice of Opportunity for Hearing to Docket Control, Arizona Corporation Commission, 1200 W.
19 Washington, Phoenix, Arizona 85007, within 30 calendar days after the date of
20 service of this Notice of Opportunity for Hearing. A Docket Control cover sheet must
21 accompany the Answer. A cover sheet form and instructions may be obtained from
22 Docket Control by calling (602) 542-3477 or on the Commission's Internet web site at
23 www.cc.state.az.us/utility/forms/index.htm.

24 Additionally, RESPONDENT or RESPONDENT SPOUSE must serve the Answer upon
25 the Division. Pursuant to A.A.C. R14-4-303, service upon the Division may be made by mailing
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1 or by hand-delivering a copy of the Answer to the Division at 1300 West Washington, 3rd Floor,
2 Phoenix, Arizona, 85007, addressed to Kathleen Coughenour DeLaRosa.

3 The Answer shall contain an admission or denial of each allegation in this Notice and the
4 original signature of RESPONDENT, RESPONDENT SPOUSE, or RESPONDENT's attorney. A
5 statement of a lack of sufficient knowledge or information shall be considered a denial of an
6 allegation. An allegation not denied shall be considered admitted.

7 When RESPONDENT or RESPONDENT SPOUSE intends in good faith to deny only a
8 part or a qualification of an allegation, RESPONDENT or RESPONDENT SPOUSE shall specify
9 that part or qualification of the allegation and shall admit the remainder. RESPONDENT or
10 RESPONDENT SPOUSE waives any affirmative defense not raised in the answer.

11 The officer presiding over the hearing may grant relief from the requirement to file an
12 Answer for good cause shown.

13 DATED this ____ day of _____, 2003.

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15 _____
16 Mark Sendrow
17 Director of Securities

18 Amended Notice.doc (KCD)
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